



AF/1772/IFW
KCC 4776 (K-C 17,047)
PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of Ceman et al.
Serial No. 10/003,077
Filed November 2, 2001
Confirmation No. 5328
For ABSORBENT ARTICLE HAVING MESSAGE
Examiner Nasser Ahmad

Art Unit 1772

May 26, 2004

**NOTICE OF FILING BRIEF ON APPEAL FROM THE EXAMINER
TO THE BOARD OF PATENT APPEALS AND INTERFERENCES**

TO THE COMMISSIONER FOR PATENTS,
SIR:

- * Appellant hereby files in triplicate a Brief on Appeal to the Board of Patent Appeals and Interferences. This appeal is from the Examiner's decision mailed December 1, 2003, finally rejecting the claims. A Notice of Appeal was mailed April 1, 2004.
- * The brief fee of \$330 is enclosed. If there are any additional charges in this matter, please charge our Deposit Account No. 19-1345.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that this NOTICE OF FILING BRIEF ON APPEAL FROM THE EXAMINER TO THE BOARD OF PATENT APPEALS AND INTERFERENCES in the application of Ceman et al., Serial No. 10/003,077, filed November 2, 2001, is being deposited with the United States Postal Service as first class mail in an envelope addressed to Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450 on this 26th day of May 2004.

Brenda C. Witschorek

RLB/PEB/bcw
*Enclosures



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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. REAL PARTY IN INTEREST	1
II. RELATED APPEALS AND INTERFERENCES	1
III. STATUS OF CLAIMS	2
IV. STATUS OF AMENDMENTS	2
V. SUMMARY OF THE INVENTION	2
VI. ISSUES	5
VII. GROUPING OF CLAIMS	5
VIII. ARGUMENT	5
A. The Office has Failed to Establish that Claims 25- 37 are Obvious over Beal in view of Cole.....	5
B. The Office has Failed to Establish that Claims 38 52 are Obvious over Beal in view of Cole.....	10
IX. CONCLUSION	12
APPENDIX	13

TABLE OF AUTHORITIES

CASES

In re Gulack, 703 F.2d 1381, (Fed. Cir. 1983).

Application of Miller, 418 F.2d 1392, (C.C.P.A. 1969).

Application of Royka, 490 F.2d 981, (C.C.P.A. 1974).

REFERENCES

West Group, Manual of Patent Examining Procedure, 8th Ed.
(2003).

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BRIEF FOR APPELLANTS

This is an appeal from the final rejection of the claims of the above-identified application made in the Office action mailed December 1, 2003 and the Advisory Action mailed April 13, 2004. A Notice of Appeal was filed in the Patent Office on April 1, 2004.

I. Real Party in Interest

The real party in interest in the present appeal is Kimberly-Clark Worldwide, Inc. of 401 North Lake Street, P.O. Box 349, Neenah, Wisconsin 54957-0349, a corporation of the State of Delaware, owner of a 100 percent interest in the pending application.

II. Related Appeals and Interferences

Appellants, appellants' legal representative and the assignee are unaware of any other appeals or interferences which would directly affect, which would be directly affected by, or which would have a bearing on the Board's decision in the pending appeal.

III. Status of Claims

Claims 1-24 have been cancelled and are not part of the appeal. Claims 25-52 are pending in the application. Claims 25-52 stand rejected under 35 U.S.C. § 103(a) as being obvious over of U.S. Patent No. 5,429,630 (Beal) in view of U.S. Pat. No. 5,147,698 (Cole).

The rejection of claims 25-52 is appealed. Copies of the claims being appealed are attached hereto as Appendix A.

IV. Status of Amendments

An amendment after final pursuant to 37 C.F.R. §1.116 was filed on February 6, 2004 to place the application in better form for appeal. The Office in an Advisory Action mailed April 13, 2004 entered the amendments. The Examiner's courtesy and consideration in after final practice is noted and appreciated.

V. Summary of Invention

The following summary is in accordance with M.P.E.P. §1206 and correlates claim elements to specific embodiments described in the application specification. Consistent with M.P.E.P. §1206, the following summary does not in any manner whatsoever limit claim interpretation. Rather, the following summary is to facilitate the Board's understanding of the subject matter of this appeal.

The feminine care product of the presented invention is an article of manufacture directed generally to the well-being, health, and fitness of women during menstruation, which includes both physical and emotional factors. Women often experience sadness, irritability or other mood changes along with bleeding

during menstruation. Some women experience emotional lows and may be in need of motivation, inspiration, or entertainment. In addition, there is a general need to educate women about women's health issues and, more particularly, to women's health issues related to the menstrual cycle. The present invention addresses these problems.

Briefly, one embodiment of the present invention is directed to a feminine care product, such as a feminine napkin 20. (Specification, page 3, lines 27-34, and Figs. 1 and 2.). The feminine napkin includes a body 24 having a peripheral edge 26, a first side 28, and a second side 30 opposite the first side. (Specification, page 4, lines 1-4, and Figs. 1 and 2). An adhesive coating 40 applied to the first side 28 of the body 24 permits a user to attach the body to underwear. (Specification, page 4, lines 15-18, and Fig. 2). A covering 42 is removably attached to the adhesive coating 40 to prevent it from sticking to something before the user removes the covering. (Specification, page 4, lines 24-27, Fig.2). The covering 42 has a size and shape selected for covering at least a portion of the adhesive coating 40 when attached to the adhesive coating, a release side 44 for contacting the adhesive coating when the covering is attached to the coating, and a message side 46 opposite the release side. (Specification, page 4, line 27 through page 5, line 4, and Fig. 2).

The message side 46 of the covering includes text 48 directed to communicating a message to the user. Stated one way, the message is related to at least one of motivating the user, entertaining the user, educating the user, and inspiring the user. (Specification, page 5, lines 18-22). The text 48 is

unrelated to instructing use of the feminine care product 20 or designating a source of the feminine care product.

(Specification, page 6, lines 1-4). Stated another way, the text 48 communicates a message to the user for mitigating the emotional lows some women experience during menstruation.

(Specification, page 5, lines 18-22).

For example, the indicia 48 may communicate an inspirational or motivational message such as "Life is a verb, not a noun." or "Live each day to its fullest." Examples of an entertaining message include humorous messages such as "You flow girl." or fortune-cookie-type messages such as "You will mend a rift with an old friend." or trivia-type messages such as "Did you know that black is the most popular underwear color among women?" An example of an educational message includes health related messages such as "Remember to drink eight glasses of water each day to stay healthy." or "Visit your gynecologist annually for good health." By educating the woman on her health and well-being, she is better able to manage the emotional as well as the physical aspects of menstruation. Although the message side 46 may also include other messages related to using the absorbent article or messages related to designating a source of the absorbent article, in one embodiment the message side 46 of the covering is substantially free of messages related to using the napkin 20 and messages related to designating a source of the napkin (e.g., the manufacturer's trademark). (Specification, p. 5, l. 18 - p. 6. l. 4).

VI. Issues

The issues presented on appeal are as follows:

1. Whether claims 25-52 satisfy 35 U.S.C. §103 over Beal in view of Cole.

VII. Grouping of Claims

For the purposes of this Appeal, claims 25-52 do not stand or fall together. The claims have been divided into two groups: Group I (claims 25-37) and Group II (claims 38-52). The claims of Groups I and II are separately and independently patentable for the reasons described in Sections VIII (A) and (B) *infra*.

VIII. Argument

A. The Office has Failed to Establish that Claims 25-37 are Obvious over Beal in view of Cole

Claim 25 is directed to a feminine care product comprising, *inter alia*:

(a) a body having a peripheral edge, a first side, and a second side opposite said first side;

(b) an adhesive coating applied to said first side of the body permitting a user to attach said body to a preselected surface; and

(c) a covering removably attached to the adhesive coating to prevent attachment of the body before the user removes the covering from the adhesive coating, said covering having a size and shape selected for covering at least a portion of the adhesive coating when attached to the adhesive coating, a

release side for contacting the adhesive coating when the covering is attached to the coating, and a message side opposite said release side;

(d) wherein said message side of the covering includes text directed to communicating a message to the user related to at least one of motivating the user, entertaining the user, educating the user, and inspiring the user, wherein said text is unrelated to instructing use of the feminine care product or designating a source of the feminine care product.

The Office rejected claim 25 under 35 U.S.C. §103(a) as being obvious in view of the combination of Beal and Cole. However, these references fail to show or suggest a feminine care product having all of the features recited in claim 25. Particularly, these references fail to show or suggest a text message directed to motivate, entertain, educate or inspire the user, wherein the text is unrelated to instructing use of the product or designating a source of the product.

The present invention is unique in its function of holistic treatment of the conditions of menstruation. Today, nearly everyone understands (as women have understood, no doubt for millennia) that menstruation involves not only a physical condition but also an emotional condition. Although the severity of the emotional impact varies among individual women, its direct and causal relation to the condition of menstruation is undeniable. The claimed invention is the first to treat both the physical and emotional aspects of menstruation.

Beal discloses a feminine care product but does not disclose an adhesive covering containing a message.

Accordingly, Beal is not directly pertinent to the distinction that appellants submit make the present invention patentable.

Cole discloses a bandage for the moist healing of wounds. The bandage comprises a two faced adhesive film covered on one face by a releasable liner and a backing on the other. (Cole, col. 7 ll. 38-42). The liner allows the adhesive film to be selectively used by preventing the adhesive from sticking prematurely to an undesirable article. The backing permanently attaches to the back face of the adhesive film. (Cole, col. 7 ll. 42-44). In addition, Cole discloses the placement of a **logo, a decorative design or instructions for use** of the product on either the backing or the releasable liner. (Cole, col. 7 ll. 8-11.).

Cole does not teach or suggest a releasable liner having text communicating a message for motivating, entertaining, educating, or inspiring the user, wherein the text is unrelated to instructing use of the product or designating a source product. It is noted in this regard that the sum total of disclosure of Cole regarding text on a release liner is what is stated in the last sentence of the preceding paragraph. A logo could be or include text, but is a source designator in the context of a consumer product like a bandage or feminine napkin, which is positively excluded from the scope of claim 25. A decorative design is an ornamental pattern and not text. Instructions for use are obviously text, but claim 25 also explicitly excludes instructions for use from the message of the text that is claimed. Appellants note that there is nothing inherently ambiguous or uncertain about the use of negative limitations. MPEP § 2173.05(i). The negative requirements of

claim 25 clearly set forth the boundaries of protection being sought. Accordingly, Cole fails to provide the missing structure of Beal and cannot render claim 25 unpatentable.

It is believed to be the Examiner's position that the **subject matter** of the text cannot be used to distinguish over Cole. Although the Examiner maintains that weight is being given to the presence of text, "any printed information [found in the prior art] is considered text prints and, as for the specific text message, it may be a trademark or copyright concern." Interview Summary mailed February 23, 2004. Stated another way that appellants believe capture the essence of the Examiner's position, "text is text."

Appellants respectfully disagree with this rejection because the claim recitation directed to the subject matter of the message on the adhesive covering is entitled to patentable weight. According to 35 U.S.C. §103(a), the subject matter of the claim (including any printed matter) must be viewed "as a whole" in order to determine its patentability. In re Gulack, 703 F.2d 1381, 1385 (Fed. Cir. 1983). Thus, in an article of manufacture claim, text can be given "patentable weight" so long as the printed matter has a functional relationship with the article. In re Miller, 418 F.2d 1392, 1396 (C.C.P.A. 1969). See also, In re Royka, 490 F.2d 981, 985 (C.C.P.A. 1974) (stating that printed matter may constitute a structural limitation upon which patentability can be predicated).

In In re Miller, the claims before the court were directed to measuring cups and spoons having indicia, a legend and pre-converted volumetric units, for measuring recipe ingredients in proportions different from those presented in a cookbook. The

legend provided the ratio between the pre-converted volumetric units and the true volumetric units. For example, if the legend were "One Half Recipe", the pre-converted volumetric units presented on the measuring device would really be one-half of the indicated values (i.e. 2 cups would really be 1 cup). Thus, the measuring device provided a unique structure for performing mathematical conversion necessary when one is making a serving different from the one presented in the cookbook. The court recognized measuring cups and spoons marked with measurement indicia as being well known. Id. at 1395. The Court in finding that the examiner improperly held the claims to be unpatentable, stated "here there is a new and unobvious functional relationship between the measuring receptacle, volumetric indicia thereon indicating volume in a certain ratio to actual volume, and a legend indicating the ratio." Id. at 1396. Thus, patentability turned on the fact that the meaning or subject matter of the indicia (being, for example, half the actual stated volume) had a new and unobvious functional relationship with the receptacle.

Appellants submit that In re Miller is particularly instructive in the present case. If the "text is text" standard were a correct application of the law of obviousness, Miller's application would have been rejected. Not only did the prior art show indicia, it was the same indicia (i.e., numerical indications of volume) that existed on the prior art. However, because the meaning or subject matter of that indicia (e.g., some fraction or multiple of the actually indicated value) in the context of the item being claimed had a new and unobvious functional relationship, the claim was found to be patentable.

If the proper standard is applied to appellants' claimed invention, it is also patentable.

The message or subject matter of appellants' claimed text has a new and unobvious relationship with the claimed feminine care product. This relationship is new and unobvious because it allows a holistic treatment of women's menstrual periods by the claimed feminine care product that has not previously been achieved. The claimed feminine care product body treats the menstrual condition by collecting the discharge associated with menstruation. The claimed covering has text with a message that functionally relates to the treatment of menstruation addressed by the feminine care product body. The claimed text treats the emotional condition that is inexorably a part of menstruation. This combination is unique and patentable in its function of holistic treatment of menstruation.

Because Cole and Beal fail to show or suggest each and every element of the claimed invention and the subject matter of the text is entitled to patentable weight since it is functionally related to the claimed feminine care product, claim 25 is submitted as patentable over the references of record and in particular Beal and Cole.

Claims 26-37 depend directly or indirectly from claim 25 and are submitted as patentable for the same reasons.

B. The Office has Failed to Establish that Claims 38-52 are Obvious over Beal in view of Cole

Claim 38 is directed to a feminine care product for addressing both the physical and emotional needs of a women during menstruation comprising, *inter alia*:

(a) an absorbent body for adsorbing body fluids discharged during menstruation, the absorbent body having a peripheral edge, a first side, and a second side opposite said first side;

(b) an adhesive coating applied to said first side of the body permitting a user to attach said body to a preselected surface; and

(c) a covering removably attached to the adhesive coating to prevent attachment of the body before the user removes the covering from the adhesive coating, said covering having a size and shape selected for covering at least a portion of the adhesive coating when attached to the adhesive coating, a release side for contacting the adhesive coating when the covering is attached to the coating, and a message side opposite said release side;

(d) wherein said message side of the covering includes text communicating a message to the user for mitigating the emotional lows some women experience during menstruation.

Claim 38 is also submitted as patentable over the references of record, and in particular, non-obvious in view of the combination of Beal and Cole. As discussed in connection with claim 25, Beal has no disclosure or suggestion of text on a release liner. Cole discloses a release liner with a logo, decorative design or instructions for use printed on it. Cole lacks any disclosure of a message that mitigates the emotional lows some women experience during menstruation. A logo designates a source of a product and has no bearing on the emotional condition of a menstruating woman. The same may be said regarding instructions for use. A decorative design might

conceivably have a salubrious effect on the emotional condition (although there is no suggestion in Cole for this), but is not text. Thus, Cole fails to provide the missing disclosure of Beal and does not render claim 38 obvious.

As to the weight that should be given to the message or subject matter of the claimed text, appellants refer to the argument given above with respect to claim 25. It is noted that claim 38 expressly ties the meaning or subject matter of the text to menstruation and the mental conditions associated therewith. Accordingly, claim 38 should be considered separately from claim 25.

Claims 39-52 depend directly or indirectly from claim 38 and are submitted to be patentable over the references of record for the same reasons as claim 38.

IX. Conclusion

The rejections of the claims on appeal are in error for the reasons set forth above. Therefore, appellant requests that the Examiner's rejections of claims 25-52 be reversed.

* Enclosed is a check in the amount of \$330.00 for the appeal brief fee under 37 CFR 1.17(c). Any additional fee may be charged to Deposit Account No. 19-1345.

Respectfully submitted,



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APPENDIX
PENDING CLAIMS ON APPEAL

25. A feminine care product comprising:
a body having a peripheral edge, a first side, and a second side opposite said first side;

an adhesive coating applied to said first side of the body permitting a user to attach said body to a preselected surface;
and

a covering removably attached to the adhesive coating to prevent attachment of the body before the user removes the covering from the adhesive coating, said covering having a size and shape selected for covering at least a portion of the adhesive coating when attached to the adhesive coating, a release side for contacting the adhesive coating when the covering is attached to the coating, and a message side opposite said release side;

wherein said message side of the covering includes text directed to communicating a message to the user related to at least one of motivating the user, entertaining the user, educating the user, and inspiring the user, wherein said text is unrelated to instructing use of the feminine care product or designating a source of the feminine care product.

26. A feminine care product as set forth in claim 25 wherein said body is an absorbent body.

27. A feminine care product as set forth in claim 26 wherein said message side of the covering is substantially free

of messages related to using the feminine care product.

28. A feminine care product as set forth in claim 27 wherein:

said feminine care product is a first feminine care product;

said first feminine care product is grouped with a second feminine care product; and

said first and second feminine care product are received in a container.

29. A feminine care product as set forth in claim 28 wherein said second feminine care product is substantially identical to said first feminine care product.

30. A feminine care product as set forth in claim 28 wherein the container includes a message related to using the feminine care product.

31. A feminine care product as set forth in claim 30 wherein the message related to using the feminine care product is printed on an exterior of the container.

32. A feminine care product as set forth in claim 26 wherein said message side of the covering is substantially free of messages related to designating a source of the feminine care product.

33. A feminine care product as set forth in claim 32 wherein:

said feminine care product is a first feminine care product;

said first feminine care product is grouped with a second feminine care product; and

said first and second feminine care products are received in a container.

34. A feminine care product as set forth in claim 33 wherein said second feminine care product is substantially identical to said first feminine care product.

35. A feminine care product as set forth in claim 33 wherein the container includes a message related to using the feminine care product.

36. A feminine care product as set forth in claim 34 wherein the message related to using the feminine care product is printed on an exterior of the container.

37. A feminine care product as set forth in claim 26 wherein said feminine care product is a feminine napkin.

38. A feminine care product for addressing both the physical and emotional needs of a women during menstruation comprising:

an absorbent body for adsorbing body fluids discharged during menstruation, the absorbent body having a peripheral edge, a first side, and a second side opposite said first side;

an adhesive coating applied to said first side of the body permitting a user to attach said body to a preselected surface;

and

a covering removably attached to the adhesive coating to prevent attachment of the body before the user removes the covering from the adhesive coating, said covering having a size and shape selected for covering at least a portion of the adhesive coating when attached to the adhesive coating, a release side for contacting the adhesive coating when the covering is attached to the coating, and a message side opposite said release side;

wherein said message side of the covering includes text communicating a message to the user for mitigating the emotional lows some women experience during menstruation.

39. A feminine care product as set forth in claim 38 wherein said message side of the covering is substantially free of messages related to using the feminine care product.

40. A feminine care product as set forth in claim 39 wherein:

said feminine care product is a first feminine care product;

said first feminine care product is grouped with a second feminine care product; and

said first and second feminine care products are received in a container.

41. A feminine care product as set forth in claim 40 wherein said second feminine care product is substantially identical to said first feminine care product.

42. A feminine care product as set forth in claim 40 wherein the container includes a message related to using the feminine care product.

43. A feminine care product as set forth in claim 42 wherein the message related to using the feminine care product is printed on an exterior of the container.

44. A feminine care product as set forth in claim 38 wherein said message side of the covering is substantially free of messages related to designating a source of the feminine care product.

45. A feminine care product as set forth in claim 44 wherein:

said feminine care product is a first feminine care product;

said first feminine care product is grouped with a second feminine care product; and

said first and second feminine care products are received in a container.

46. A feminine care product as set forth in claim 45 wherein said second feminine care product is substantially identical to said first feminine care product.

47. A feminine care product as set forth in claim 45 wherein the container includes a message related to using the feminine care product.

48. A feminine care product as set forth in claim 46 wherein the message related to using the feminine care product is printed on an exterior of the container.

49. A feminine care product as set forth in claim 38 wherein the absorbent body is a feminine napkin.

50. A feminine care product as set forth in claim 38 wherein the text is directed to communicating a message to the user related to educating the user regarding feminine health issues.

51. A feminine care product as set forth in claim 50 wherein said feminine health issues are related to feminine hygiene issues.

52. A feminine care product as set forth in claim 51 wherein said feminine hygiene issues are generally related to the menstrual cycle.